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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]221

HARMAR DRIVE-IN THEATRE, INC.,
Petitioner,

—against—

WARNER BROS. PICTURES, INC.
(In Dissolution), et al.,
Defendants,

and

PARAMOUNT FILM DISTRIBUTING CORP., ET AL.,
Respondents.

COLONIAL DRIVE-IN THEATRE, INC.,
Petitioner,

—against—

WARNER BROS. PICTURES, INC.
(In Dissolution), et al.,
Defendants,

and

PARAMOUNT FILM DISTRIBUTING CORP., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

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HARMAR DRIVE-IN THEATRE, INC.,
Petitioner,

—against—

WARNER BROS. PICTURES, INC.
(In Dissolution), *et al.*,
Defendants,

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PARAMOUNT FILM DISTRIBUTING CORP., *et al.*,
Respondents.

No. 1121

COLONIAL DRIVE-IN THEATRE, INC.,
Petitioner,

—against—

WARNER BROS. PICTURES, INC.
(In Dissolution), *et al.*,
Defendants,

and

PARAMOUNT FILM DISTRIBUTING CORP., *et al.*,
Respondents.

BRIEF FOR RESPONDENTS

Respondents pray that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied. That judgment reversed an order of the United States District Court for the Southern District of New York (App. 3) and remanded the cause with the directions to grant respondents' motion to disqualify Arnold Malkan from acting as

the attorney for the plaintiffs in the above-entitled actions (1a-5a).*

Questions Presented

1. Where five motion picture exhibitor corporations are owned and controlled by the same family, are in business in the same area and are associated in the same theatre chain, and an attorney would be barred by Canons 6 and 37 from representing three of those exhibitor corporations in private antitrust suits against certain motion picture companies because he was the senior partner in a disqualified law firm retained by those exhibitors, is he qualified to represent the other two exhibitor corporations in similar suits against the same motion picture companies?

2. When a motion to disqualify an adverse party's attorney based upon use of the moving party's confidences is denied, may the moving party appeal from such denial?

Canons Involved

In addition to Canon 6 of the Canons of Ethics of the American Bar Association, set forth in the Petition, Canon 37 of such Canons is also involved in these cases:

> "Canon 37. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept em-

*References are as follows:

"R"—to the pages of the original papers in the Court of Appeals;

"a"—following a page number—to the Appendix attached to the Petition;

"App."—following a page number—to respondents' printed appendix in the Court of Appeals.

ployment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

Statement

The plaintiffs in these antitrust actions, Harmar and Colonial, are two incorporated drive-in theatres in the Pittsburgh area and are part of the Associated Drive-in Theatre chain of that locality; which also includes three other incorporated theatres, South Park, Community and Blue Dell (R. 1, 87; App. 10). Each member of the chain is a closed corporation; all of the capital stock of the five corporations is held by one family—the Stern family—except that 50% of the stock in plaintiff Harmar is held by the Rodnok family (App. 10, 13, 16, 34). Ernest Stern is an officer of all five corporations (App. 33); and Norbert Stern, Ernest Stern, Stephen Rodnok, Jr. and George Rodnok were the incorporators of Harmar (R. 61-62).

Arnold Malkan and David H. Isacson were the sole partners in the law firm of Malkan & Isacson from July, 1952 until that firm was dissolved in July, 1954 (App. 10). In or about January, 1953, the Stern family retained the firm of Malkan & Isacson to bring three private antitrust suits on behalf of South Park, Community and Blue Dell in the District Court for the Western District of Pennsylvania against many of the motion picture companies named as defendants in the present actions (App. 33, 10). Malkan has testified that Isacson had met the principals in the *South Park*, *Community* and *Blue Dell* cases, and

that upon the dissolution of Malkan & Isacson those principals retained Malkan (App. 10-11):

> "Mr. Bromley: Mr. Phillips suggests that I ask him about the three cases that he brought in Pennsylvania.
>
> *By Mr. Bromley.*
>
> "Q. What were their names? A. The South Park, Blue Dell and the Community Drive-In cases, three drive-in cases.
>
> "Q. When did you bring them? A. They were similar to the Laskey case in that prior to the dissolution of the firm Mr. Isacson had met the principals in those three cases. I might say, to reduce the magic of how so many cases came in, those three drive-in theatres were all owned by the same family. When Mr. Isacson and I dissolved, a full statement of the facts was given to these people and to their local attorney, and they decided to retain me."

In 1954, Isacson and the firm of Malkan & Isacson were held disqualified to bring antitrust actions against many of the motion picture companies who are respondents in the present actions. *Fisher Studio, Inc.* v. *Loew's Incorporated, et al.*, 232 F. 2d 199 (2d Cir. 1956), *cert. denied*, 352 U. S. 836 (1956). Disqualification there was based upon fact that during his former employment on behalf of such respondents Isacson had gained a vast amount of confidential information with respect to antitrust matters concerning them which would have been immensely helpful in the trial of the case. Although not used as a basis for disqualification, Chief Judge Clark said "the evidence of solicitation" by Isacson was "clear cut and convincing, and in many cases" was "interwoven with the evidence of improper use of confidential information" (232 F. 2d 199, 202).

After its disqualification, the firm of Malkan & Isacson was dissolved and Malkan then joined with one Ellner to

form a new firm which promptly recommenced the *South Park, Community* and *Blue Dell* actions *de novo* in the same court where the actions instituted by Malkan & Isacson were pending, adding new defendants and increasing the damage claims (App. 11-12). Thereafter George and Ernest Stern talked to Malkan about bringing an antitrust action on behalf of Colonial (App. 22) and in early June, 1955, Malkan & Ellner were retained to bring the present actions on behalf of Colonial and Harmar (App. 30, 33).

Malkan's qualification in the present cases depended upon an interpretation of two earlier Second Circuit decisions dealing with Malkan's status in other cases. In *Laskey*,* Malkan was disqualified from representing plaintiff Laskey because the disqualified firm of Malkan & Isacson had represented Laskey in an antitrust action against motion picture companies including respondents. In *Austin*,* however, it was found that the plaintiff had first come to Malkan after the dissolution of his partnership with Isacson and then only through "channels completely apart from Malkan's former association with Isacson" (224 F. 2d 824, 825). The Court of Appeals held Malkan qualified because the *Austin* case had "no relationship to the old partnership" (*Id.* at 827).

The present cases, the Court of Appeals held, called for the application of the *Laskey* rule because the client had not come to Malkan through channels apart from Isacson. The Court noted the controlling position of the Stern family in all five corporations and that the claims in all five cases were substantially the same. In essence the question was whether the separate corporate entities of the five plaintiffs protected Malkan. The Court of Appeals, in effect piercing the corporate "veil", took the realistic position that the beneficial

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Laskey Bros. of W. Va. Inc. v. *Warner Bros. Pictures, et al.* and *Austin Theatres, Inc.* v. *Warner Bros. Pictures, et al.*, 224 F. 2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

ownership controlled and that therefore the respondents as former clients of Isacson were entitled to protection against the possible misuse of their confidential information.

Reasons for Denying the Writ

1. The Petition Raises No Significant Question.

The only problem involved in these cases is whether the corporate entities of these theatres should have been disregarded. The narrowness of the issue presented should preclude the granting of certiorari. In ordering Malkan's disqualification in the present cases, the Second Circuit was not required to establish any principle of general application; it was only required to interpret its earlier decisions. Although the Petition imagines the decision will have widespread effects upon government and salaried attorneys, it should be noted that the unique situation in these cases is unlikely to recur in a disqualification case since it only arises from the one family's control of five corporations with antitrust claims.

The general principles governing the qualification of Malkan were established in three earlier cases (*Fisher, Laskey* and *Austin, supra*) and in each of those cases this Court has denied certiorari. It would seem anomalous for this Court to grant certiorari now after having denied it in the earlier, more significant cases. The petitioners realize this and therefore devote much of the Petition to a veiled attack upon the *Fisher* and *Laskey* decisions (Petition pp. 8-12). The petitioners are in effect asking this Court to reverse *Laskey* and in addition to decide a number of questions not even present in these cases (Petition p. 12). The petitions for certiorari in *Fisher* and *Laskey* contained the same arguments about the fearful effect of those decisions upon the legal profession as are contained in the petition herein. Respondents do not deny that the decision

is of significance to attorneys; but they believe its significance arises from the fact that it will help to preserve in the public mind the integrity of the legal profession.

2. The *Laskey* Rule Was Correctly Applied.

The determination of whether the *Laskey* or *Austin* rule applies depends upon whether or not a court will look through the corporate entities to the real client, namely the Stern family. As the Court of Appeals pointed out, the *Laskey* rule would compel Malkan's disqualification if he sought to represent three of the five theatres controlled by the Sterns in antitrust actions against the respondents in the Southern District of New York. It would seem highly illogical, especially to the clients whose confidences are at stake, if Malkan were permitted to represent the two remaining members of the theatre chain against the respondents in exactly the same type of antitrust actions in the Southern District.

The purpose of the *Laskey* rule was to provide clients with a small measure of protection against faithless lawyers and to avoid the appearance of evil. See Irving R. Kaufman, *The Former Government Attorney and The Canons of Professional Ethics*, 70 Harv. L. Rev. 657, 659-660 (1957). That rule bases the disqualification of the partner of an attorney who had confidential information upon the fact that the partner had access to such confidential information at least with respect to cases handled by their partnership. The *Laskey* rule necessarily requires Malkan's disqualification here because the real client in these cases is the same client which retained Malkan & Isacson to bring antitrust actions on behalf of South Park, Community and Blue Dell against many of the respondents herein. Since Malkan had access to confidential information with respect to those three actions and since the present actions are closely related to those three actions in view

of the fact that all five theatres are controlled by the same family, are in the same chain and are located in the same area, Malkan is disqualified in the present actions.

The Petition (pp. 9-10) unreasonably seeks to truncate the effect of the *Laskey* decision so as to limit it to exactly the same case as that in which the partnership was disqualified to act.* But such a limitation would be incongruous in the present cases since all five actions involve "run and clearance" problems. In preparing for and instituting the three actions Malkan and Isacson must necessarily have considered facts and issues common to and relevant to the potential antitrust claims of all five corporations. Moreover, to permit Malkan to represent the petitioners would be to allow him to benefit from his partnership with Isacson (as well as from Isacson's solicitation of exhibitors).

In its attempt to convince this Court that Malkan's disqualification is of great significance to the legal profession, the Petition presents Malkan in the role of an innocent bystander. As a matter of fact Malkan was the senior member of Malkan & Isacson and he could not have avoided knowing that Isacson was soliciting antitrust actions against the respondents by holding out as "bait" to potential clients the confidential information which Malkan & Isacson was willing to use against Isacson's former clients. It is inconceivable that Malkan would now be representing the plaintiffs in the present cases if it had not been for his partnership with Isacson. The record in the *Fisher* case clearly showed that the Rodnoks who own 50% of the stock in plaintiff Harmar were solicited by the firm of Malkan & Isacson in 1952, despite the fact that at that very time the Rodnoks were defendants en-

*But where it suits their purposes the petitioners extend the *Laskey* rule in a fanciful manner to "include all those in the office of the contaminated attorney." (Petition p. 11)

gaged in litigation against motion picture companies represented by Sargoy & Stein, the law firm with which Isacson had previously been associated (App. 15, 19-21). There was testimony in that case that Stephen Rodnok, Jr. wanted Isacson because he "knew all of the tricks that Sargoy & Stein would resort to and knew all of the procedures that they had followed in the past. . . ." (App. 20-21).

No sooner had the firm of Malkan & Isacson been formed than it began a campaign of solicitation by inserting an announcement of the firm's formation in a trade paper and mailing "doctored" photographs of the announcement "to persons who were at that very time engaged in litigation with his (Mr. Isacson's) former clients" (App. 14, *et seq.*). Mr. Isacson admitted that he had sent, together with cards announcing the formation of the firm, doctored photographs of an article appearing in the "Independent Film Journal", dated August 9, 1952, which stated originally that "David H. Isacson, formerly with the law firm of Sargoy & Stein, became associated with Arnold Malkin, prominent New York attorney". (*Ibid.*) Mr. Isacson doctored his photographs so that the word "antitrust" was added before the word "attorney" and Mr. Malkan's name was spelled correctly.

The Special Master's Report in *Fisher* concluded that the alteration in the newspaper item was made by Mr. Isacson or under his direction. (*Ibid.*) It is inconceivable that Malkan did not know and approve of what Isacson was doing. Doubtless the expense of printing and mailing the cards was borne by Malkan. It would be unheard of for a junior partner to send out announcements without the knowledge and approval of his senior.

When those facts were adduced before the Special Master, Malkan did not disavow them, and although present at the proceedings before the Special Master, he did not

take the stand to deny any of the facts about his firm even though its conduct was clearly in violation of the Canons of Ethics.

By overlooking Malkan & Isacson's solicitation of exhibitors in which confidential information was used as bait, the Petition is able to assume that disqualification is based on agency law, rather than ethics, and an attempt is made to introduce as an analogy a hornbook rule on the question of when an agent's knowledge will be imputed to his principal. That analogy is not helpful because the issue here turns on access to confidential information and the impossibility of proof by the former client that confidential information has passed from one partner to another, rather than on the imputation of knowledge.

3. Denial of the Motion for Disqualification was an Appealable Order.

Prior to Judge Clark's dissent in these cases there was never any question but that decisions on motions for disqualification of attorneys were appealable under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949). It must be assumed that the Second Circuit considered the question of appealability in the *Fisher, Laskey* and *Austin* cases and also in *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp. et al.*; 216 F. 2d 920 (1954). Judge Clark's suggestion that an order granting disqualification is appealable, while an order denying disqualification is not, is unsatisfactory not only because it defeats the principle of mutuality but also because it fails to realize that clients are entitled to protection against violations of their confidences. Deferment of appellate review of the orders appealed from in the present cases would necessarily deny effective or meaningful review of such orders since the purpose of the motions to disqualify is to prevent the use by petitioners' attorney at trial of the special knowledge or confidential

information which legally he is conclusively presumed to have obtained from Isacson.

Accordingly, it seems clear that the denial of the motion to disqualify Malkan, like the order in *Cohen,* constituted the determination of a claim of right "separable from" and "not an ingredient of" the main cause, which was "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". 337 U. S. 541, 546-547. It should be noted that reversal of a final judgment in favor of the petitioners after trial of the main actions could not undo the harm resulting from the use of the confidential information at the original trials because nothing could stop petitioners and their substituted attorneys from gaining subtle advantages as a result of such use in later trials. *Cf. Overby* v. *U. S. Fidelity and Guarantee Co.*, 224 F. 2d 158, 162 (5th Cir. 1955).

There is ample precedent supporting this interpretation of *Cohen.* See *e.g. Roberts* v. *United States District Court for the Northern District of California,* 339 U. S. 844 (1950); *Collins* v. *Miller,* 198 F. 2d 948 (D. C. App. 1952).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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